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No. 04-875

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

LAFFIT PINCAY, JR., *et al.*,
Petitioners,

v.

VINCENT S. ANDREWS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it was not an abuse of discretion for a district court to find "excusable neglect," under Rule 4(a)(5), Fed. R. App. P., and the principles of *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), when a lawyer missed a filing deadline because of his reliance on a previously error-free calendaring system.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Vincent Andrews Management Corporation has no parent corporation, and no publicly-held company owns 10 percent or more of its stock.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

The issue now before the Court arises out of a district court order granting respondents an extension of time in which to file a notice of appeal. Applying the language of Rule 4(a)(5) of the Federal Rules of Appellate Procedure, and the principles set forth by this Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), the district court found that respondents had demonstrated "excusable neglect" for their failure to meet the original deadline. After a panel reversed that order, the Ninth Circuit, sitting en banc, vacated the judgment of the panel and affirmed the order granting the extension of time. It thus directed the panel to decide the merits of the appeal. That appeal is presently pending.

A. The Underlying Action

The facts of the underlying action may be briefly summarized. Petitioners are horse racing jockeys who were business management clients of respondent Vincent Andrews Management Corporation ("Andrews Management") and its predecessor from 1967 (in the case of petitioner Pincay) and 1979 (in the case of petitioner McCarron). *See Pincay v. Andrews*, 238 F.3d 1106, 1107 (9th Cir. 2001) (*Pincay I*). Andrews Management handled its clients' accounting and tax matters, prepared budgets, obtained insurance policies and mortgages, and developed retirement plans. Pursuant to an oral agreement, the terms of which date to 1967, Andrews Management charged its clients five percent of their professional income for those services. *Id.*

Petitioners have complained that, unbeknownst to them, they were overcharged by respondents. In essence, their claims rest on two assertions, both of which must be true for them to prevail. First, they allege that their five percent oral contract with Andrews Management precluded respondents Vincent and Robert Andrews (or any entity in which they had an interest, including respondent Andrews Management) from having an interest in, or receiving any compensation from, partnerships in which petitioners chose to invest. Second, they charge that respondents received, and concealed their receipt of, such challenged compensation. *Id.* at 1108-09. Petitioners brought suit under both state law and the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et. seq.*

Both the state law and federal RICO claims were tried to a jury, which found for petitioners. *See Pincay I*, 238 F.3d at 1108. After directing petitioners to elect between their RICO remedies and punitive damages awards under state law, the

district court then entered judgment on the RICO claims.[1] On appeal, the Ninth Circuit reversed. *See id.* at 1110. Pointing out that petitioners had received clear written disclosures of respondents' interests in the partnerships at least as early as 1980, the court held that their RICO claims were untimely as a matter of law. *See id.* at 1108-10. The court also held that petitioners' claims were not tolled by the doctrine of fraudulent concealment, stating that the doctrine only operates before a plaintiff obtains actual notice of the facts underlying the particular claim. *See id.* at 1110.

Petitioners then moved in the district court for new judgments based on their state law claims, which had relied on identical facts and the same theory of concealment and tolling as their RICO claims. Respondents opposed the motion on several grounds, including the ground that the terms of the prior judgments barred petitioners from seeking entry of new judgments, and conditionally cross-moved for remittitur. The district court granted petitioners' motion and denied respondents' cross-motion. It thus entered new judgments in petitioners' favor on all of their state law claims.

B. Respondents' Motion for An Extension of Time

1. This procedural history provides the background for the matter now before the Court. Because the district court order entering judgments for petitioners was entered on the docket on July 3, 2002, Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure required respondents to file their notice of appeal on or before August 2, 2002 (30 days after the docketing). However, respondents' counsel, relying on the

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[1] While post-trial motions were still pending, respondents had filed for bankruptcy, staying further decision. Subsequently, the bankruptcy court lifted the automatic stay in order to permit resolution of post-trial motions and appeals. Petitioners' initial judgments, which related solely to their federal RICO claims, were vacated in part and then reinstated by the district court, which entered new final judgments again covering only the RICO claims.

calendaring system at his firm (discussed below), mistakenly believed that the notice was due 60 days after docketing. *See* Appellants' C.A. 9 Excerpts of Record ("ER") 072-73; Supplemental Excerpts of Record ("SER") 003-04 at ¶¶ 9-12. Respondents' counsel discovered the error only after the 30 days had passed, when petitioners filed a notice in the bankruptcy proceedings stating that the deadline had been missed. ER 073 at ¶ 11.

Respondents promptly moved, pursuant to Rule 4(a)(5) of the Appellate Rules, for an extension of time in which to file the notice. That rule, quoted in part at page two of the Petition, allows for extensions on a motion filed "no later than 30 days after the time prescribed by this Rule 4(a) expires," provided that the movant makes a showing of either "good cause" or "excusable neglect." Rule 4(a)(5)(A)(i) & (ii). Respondents argued that their documented reliance on a previously dependable calendaring system was sufficient to establish "excusable neglect." To put that argument in perspective, we set forth how that calendaring system worked and what efforts were made to comply with the filing deadline in this case.

2. The law firm representing respondents in this case calendars cases and sets filing deadlines through a system in which experienced clerks (also referred to as case managers) receive copies of all papers in a case and docket those papers. The case managers then calculate any applicable due dates, making corresponding entries on a court calendar that they maintain on the firm's computer network. Having done so, the case managers notify the attorneys working on the matter of the papers that they have received and of the due dates that they have calculated. ER 071 at ¶¶ 3-4; SER 002-03 at ¶¶ 5-6. If the case managers have questions about the applicable dates, or about interpretation of the rules, they raise those questions directly with the supervising attorney. Although the firm's attorneys may calculate the due dates for them-

selves, they commonly rely on this calendaring system to determine the relevant filing dates, and regularly review the calendar with the case managers, who understand that the calendar must be accurately maintained. ER 071 at ¶¶ 3-4; SER 002-03 at ¶ 6.

The case managers are selected and trained to perform this particular job. For example, the case manager responsible for calendaring the appeal in this case had previously worked for several years as a clerk handling case management and calendaring in another firm with an active litigation docket. Prior to that, he had worked as a clerk and a courtroom deputy in the United States District Court for the Southern District of New York, earning a Second Circuit award for his diligent service. SER 002 at ¶ 2; ER 071-72 at ¶ 5. Until the missed deadline here, the case manager had never failed to properly calculate and calendar a deadline. ER 072 at ¶ 6; SER 002-03 at ¶ 6.

3. In this case, the responsible case manager received copies of the July 3, 2002, district court judgments on July 10th. He immediately reported that fact to the attorney in charge, who was working at the offices of a client. The attorney responded later that day, asking the case manager about the judgments, and specifically asking about the deadline to notice appeal of those judgments. ER 072 at ¶ 7; SER 003 at ¶¶ 9-10.

The case manager was out of the office on July 11th, but promptly replied by e-mail on July 12th, indicating (mistakenly) that "[a]ccording to FRAP rule 4, we get 60 days from the date of entry of judgment, which was 7/3/02." SER 007.[2]

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[2] Rule 4 does provide 60 days to file a notice of appeal but only "[w]hen the United States or its officer or agency is party . . . ." Rule 4(a)(1)(B), Fed. R. App. P. The case manager acknowledges that he "knew at the time that the United States was not a party to the action." SER 004 at ¶ 13.

The case manager noted that the sixtieth day was September 1st, which was a Sunday, making the due date Monday, September 2nd. *Id.* He quickly followed up with another e-mail pointing out that, since September 2nd was Labor Day, the last day to file would actually be September 3rd. ER 072-73 at ¶ 8; SER 003-04 at ¶¶ 10-11.

The attorney then instructed the case manager to calendar the notice of appeal for the week before it was thought to be due. Specifically, the attorney said that, "[t]o be safe, let's calendar it for the Thursday before Labor Day" (*i.e.*, August 29th). ER 073 at ¶ 8; SER 004 at ¶ 12. The case manager confirmed that he had done so. The accelerated deadline was entered as the due date on the calendar that the case manager maintained. ER 073 at ¶ 10; SER 004 at ¶ 12, 009.

On Thursday, August 22nd (20 days after the notice of appeal should have been filed), the attorney received a notice submitted by petitioners in the bankruptcy court, asserting that respondents had not appealed the district court judgments by the applicable deadline. Realizing that a mistake had been made, the attorney immediately informed petitioners' counsel of his intention to file an expedited motion, pursuant to Rule 4(a)(5), to extend the time to notice the appeal. Respondents' attorney also offered to shorten the appellate briefing schedule (solely out of respondents' time) to compensate for the late notice. ER 073-74 at ¶¶ 11-12. Petitioners' counsel responded that petitioners would not agree to the relief sought. ER 075 at ¶ 16. Respondents filed their motion four days later, within the time permitted by Rule 4(a)(5).

The district court granted respondents' motion, declaring that the Notice of Appeal enclosed with the motion would be deemed timely filed as of August 27, 2002. Pet. App. 27. Applying the multi-factor test established in *Pioneer*, *see* 507 U.S. at 395, the district court found that the calendaring mistake was the result of "excusable neglect." *See* Pet. App. 23-28. Petitioners filed a timely notice of appeal from that order.

C. The Ninth Circuit Decision

The separate appeals by respondents (of the merits judgments) and by petitioners (of the order granting an extension of time), though apparently not formally consolidated by the Ninth Circuit, were argued together before the same court of appeals panel. The panel did not reach the merits, holding instead that the decision to grant the extension was a "mistake of law." Pet. App. 30. Noting the statement by this Court that "'inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect,'" Pet. App. 33 (quoting *Pioneer*, 507 U.S. at 388), the panel observed: "Here there was ignorance of the rules, compounded by delegation of knowledge of the rules to a nonlawyer for whom responsibility was not accepted." Pet. App. 37.

The Ninth Circuit then ordered the case to be reheard en banc. Pet. App. 47. In its en banc opinion, the court of appeals first considered whether it was appropriate to create a "per se rule against delegation to paralegals," Pet. App. 4, concluding that it was not. The court noted that, "[i]n the modern world of legal practice, the delegation of repetitive legal tasks to paralegals has become a necessary fixture," Pet. App. 5, and that delegation to specialized non-lawyers "may well ensure greater accuracy in meeting deadlines . . . ." Pet. App. 5. While the court emphasized that "[t]he responsibility for the error falls on the attorney regardless of whether the error was made by an attorney or a paralegal," Pet. App. 5, it nevertheless held that "delegation of the task of ascertaining the deadline was not per se inexcusable neglect." Pet. App. 6.

The court of appeals then turned to the question whether "the misreading of the clear rule could appropriately have been considered excusable." Pet. App. 6. The court surveyed the views of other Circuits on similar questions, finding more "confusion" than consensus. Pet. App. 10. However, it did find agreement on the general principle that appellate courts

should review findings regarding "excusable neglect" pursuant to an abuse of discretion standard. Pet. App. 10. Under that standard, the court said, it could not reverse the district court finding "unless [it was] left with the definite and firm conviction that the lower court committed a clear error of judgment in the conclusion it reached after weighing the relevant factors." Pet. App. 11.

The court found no such clear error of judgment here. At the same time, it made quite plain that it was basing its decision on the breadth of discretion properly accorded to the district court, not on its own independent assessment of the circumstances. Stating that "the lawyer undoubtedly should have checked the Rule itself before relying on the paralegal's reading," Pet. App. 11, the court observed: "a lawyer's failure to read an applicable rule is one of the least compelling excuses that can be offered . . . ." Pet. App. 11. Indeed, the court pointedly indicated that "[h]ad the district court declined to permit the filing of the notice, we would be hard pressed to find any rationale requiring us to reverse." Pet. App. 12. In the end, however, the court declined to adopt any per se rule, Pet. App. 13-14, choosing to "leave the weighing of *Pioneer's* equitable factors to the discretion of the district court in every case." Pet. App. 14. It thus affirmed the granting of the extension of time, and directed the panel to consider the merits of respondents' appeal. Pet. App. 14.

Judge Kozinski, joined by two other judges, dissented. Acknowledging that most of the *Pioneer* factors tilted in favor of allowing the extension, Judge Kozinski stated that "defendants need not have offered a terribly good countervailing reason to make their neglect excusable." Pet. App. 17. But he saw no adequate reason here. Rejecting the explanation that the lawyer had relied on a previously faultless calendaring system, Judge Kozinski declared that "[e]rrors made by clerks performing lawyerly functions are probably less excusable than those made by the lawyer him-

self; they certainly can't be more so." Pet. App. 19. He thus concluded that "the error here—whether made by the lawyer, the calendaring clerk or the candlestick-maker—is inexcusable . . . ." Pet. App. 22.

ARGUMENT

This case does not merit further review. Although petitioners contend that the federal courts are in conflict with respect to administration of the Rule 4(a)(5) "excusable neglect" standard, that claim is incorrect as applied to the specific question presented by this case: whether it is an abuse of discretion (or error of law) for a district court to find "excusable neglect" based upon a lawyer's reliance on a trained and previously error-free calendaring clerk. There is no conflict on that question. Only one other Circuit has even considered the application of Rule 4(a)(5) in comparable circumstances, *see United States v. Hooper*, 43 F.3d 26 (2d Cir. 1994) (per curiam), and that court held only that a district court *could* properly find the failure to file a timely notice inexcusable, not (as petitioners contend here) that it *must*. In this case, the Ninth Circuit strongly suggested (in conformity with *Hooper*) that it, too, would have affirmed a decision of the district court holding that the neglect should not be excused. Pet. App. 12.

Although petitioners rely on statements by various Circuits that a lawyer's misreading of a clear rule can never constitute "excusable neglect," *see, e.g., United States v. Torres*, 372 F.3d 1159, 1163 (10th Cir. 2004); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000); *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 133 (7th Cir. 1996), the rationale of those cases cannot automatically be imported to the circumstances here. With respect to "misreading" claims, several courts of appeals have indicated a concern that a flexible case-by-case approach to such explanations would allow lawyers who disregard or forget a deadline simply to assert after the fact that they misread the rule instead. *See, e.g., Advanced Estimating System, Inc. v. Riney*, 130 F.3d

996, 998 (11th Cir. 1997); *Lowry*, 211 F.3d at 464. Whatever the merits of that concern, it is simply inapplicable where, as here, the lawyer actively sought to ascertain and comply with the applicable deadline, relying on a calendaring system that had proved fully reliable in the past. The verifiable evidence of that effort—in contemporaneous e-mails and calendar entries—serves to distinguish the neglect in this case, unfortunate as it was, from neglect resulting from sheer indifference to a deadline or plain forgetfulness.

In any event, there is no evident need for further categorical refinement of the "excusable neglect" standard. Even the different formulations among the Circuits seem more matters of language and tone than of concrete results, for some Circuits with stricter formulations have been flexible in application. *See, e.g., United States v. Brown*, 133 F.3d 993 (7th Cir. 1998). This Court has already made clear that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect . . . ," *Pioneer*, 507 U.S. at 392, and all Circuits, including the Ninth Circuit, recognize that a finding of "excusable neglect" for such negligence must be the exception, not the rule. *See* Pet. App. 11 ("[w]e recognize that a lawyer's failure to read an applicable rule is one of the least compelling excuses that can be offered"). Given the strictness of the standard in the first place, it is likely to be the rare case in which the various courts of appeals, however they characterize their rules, would actually reach different outcomes on essentially similar facts. Additional codification of rules for subcategories of carelessness would be a complicated, even impracticable, response to a largely non-existent problem.

Finally, we note the unusual procedural posture of this case. Because the merits appeal and the timeliness appeal have gone forth as separate appeals—with one receiving en banc consideration—the timeliness appeal is now before this Court while the merits appeal is before a panel of the Ninth Circuit. A decision on the latter (if in favor of petitioners)

would almost certainly moot the former, at least absent further consideration by the Ninth Circuit or this Court. Review at this point thus would seem premature.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS RFQUIRING REVIEW

To assess whether there is a conflict among the Circuits on the issue decided by the Ninth Circuit, it is necessary first to define just what that issue was. Given the relevant circumstances and the posture of the case on appeal, the Ninth Circuit had to decide whether the district court—applying the *Pioneer* factors, *see* 507 U.S. at 395[3]—abused its discretion by finding "excusable neglect" when a lawyer relied on a previously dependable calendaring clerk to determine the correct filing date for a notice of appeal. The Ninth Circuit held that it had not. At the same time, however, the court of appeals emphasized that it was basing its decision on the highly deferential nature of its abuse-of-discretion review, stating: "[h]ad the district court declined to permit the filing of the notice, we would be hard pressed to find any rationale requiring us to reverse." Pet. App. 12.

Thus understood, the decision below is not in conflict with any decision in any other Circuit. No Circuit has held that a finding of "excusable neglect" is per se impermissible when a lawyer has made documented efforts to comply with the correct filing date but has failed, at least in part, due to the

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[3] The Court in *Pioneer* indicated that, in assessing whether particular neglect is excusable, the federal courts should consider all relevant circumstances, including "the danger of prejudice to [to the opposite party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *See Pioneer*, 507 U.S. at 395. Although *Pioneer* involved a provision of the Bankruptcy Rules, the *Pioneer* factors have regularly been applied to the "excusable neglect" standard of Rule 4(a)(5). *See Stutson v. United States*, 516 U.S. 193, 195 (1996) (citing courts of appeals cases).

unprecedented error of a calendaring clerk. (Only one other Circuit has addressed that situation. *See* pages 14-15 *infra*). Thus, while petitioners emphasize that certain courts of appeals have sought to rein in findings of "excusable neglect" under Rule 4(a)(5), those courts have typically been dealing with a different kind of situation: where the attorney in question simply let the deadline pass or claimed without contemporaneous documentation to have misread the applicable rule. It is in that particular context that various Circuits have said that the disregard or misreading of a clear rule "cannot," or can "never," amount to "excusable neglect." *See, e.g., Torres*, 372 F.3d at 1163; *Prizevoits*, 76 F.3d at 133; *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994).

Despite broad language in those cases, their underlying rationale does not readily carry over to the circumstances here. As the Eleventh Circuit has indicated, federal courts may need to treat the misreading of a clear rule exactly as they treat ordinary forgetfulness or utter indifference to the rules, given the likelihood that any lawyer guilty of the latter will afterwards claim the former if the standards diverge. *See Advanced Estimating System*, 130 F.3d at 998. The Eleventh Circuit explained: "[A] lawyer's misunderstanding of clear law *cannot* constitute excusable neglect. If it could, almost every appellant's lawyer would plead his own inability to understand the law when he fails to comply with a deadline." *Id.* (emphasis added). The Fifth, Sixth, and Eighth Circuits have made a similar point, quoting the Eleventh Circuit. *See Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877, 879 (5th Cir. 1998); *FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 687 (6th Cir. 1999); *Lowry*, 211 F.3d at 464.

This concern about unverifiable excuses is not merely theoretical. In practice, several courts of appeals have been openly skeptical about unsubstantiated claims that a lawyer was unaware of, or simply misunderstood, a clear rule. *See*

Lowry, 211 F.3d at 463-64; *Prizevoits*, 76 F.3d at 133. In *Lowry*, for example, the Eighth Circuit found no basis for "excusable neglect" in a lawyer's representations that he had miscalculated a deadline because of "the weekend time and the calculations thereto" (211 F.3d at 463) and because of "the number of days in the month of June" (*id.* at 464), pointing out that "the rules clearly provide that intermediate weekends are to be counted in the thirty-day computation" and that "[i]f June had thirty one days instead of thirty, the notice of appeal would have been due one day *sooner*." *Id.* at 463-64 (emphasis added). Bluntly dismissing these explanations, the Court declared that "what we have, then, is garden-variety attorney inattention." *Id.* at 464. Similarly, in *Prizevoits*, the Seventh Circuit found implausible the claimed belief of an experienced lawyer that he had tolled the appeal period by seeking additional time for a Rule 59(c) motion, *see* Rule 59(c), Fed. R. Civ. P., given the explicit language of Rule 6(b) that the time for Rule 59(c) motions cannot be extended. *See* 76 F.3d at 133. The Seventh Circuit stated flatly: "[The lawyer] must know about Rule 6(b). An unaccountable lapse is not excusable neglect." *Id.*; *see also id.* ("excuses [are] so thin as to leave the lapse not only unexcused, but inexplicable.") And, while judges may be reluctant to accuse particular lawyers of fabricating excuses, it is natural to expect that they will wonder just how an attorney can, in fact, "misread" a truly clear and unambiguous rule. *See generally Consolidated Freightways Corp. of Delaware v. Larson*, 827 F.2d 916, 919 (3d Cir. 1987) (court must consider, *inter alia*, "whether the asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court"); *United States v. Guy*, 140 F.3d 735, 736 (7th Cir. 1998) (error by experienced lawyer was "inexplicable").

The circumstances here, however, are different. Although the lawyer missed an easily-identifed deadline, there is no possibility that he did so as a result of forgetfulness or utter indifference. Rather, as the relevant e-mail correspondence

showed, both the lawyer and the calendaring clerk engaged in a genuine effort to make a timely (indeed, even an early) filing. Unlike the purported "misreading" cases, therefore, the district court had before it concrete verifiable evidence that the lawyer—though making an error of judgment—did not "freely ignor[e]" the deadline, *see Pioneer*, 507 U.S. at 395, or neglect the matter entirely. Depending upon how the other *Pioneer* factors are weighed, that proof of effort may be enough to turn an otherwise inexcusable failure to comply with Rule 4(a)(1) into an excusable one. *See* Pet. App. 14-16 (Berzon, J., concurring).[4]

The Second Circuit is the only federal court of appeals to address application of Rule 4 under similar circumstances—in *United States v. Hooper*, 43 F.3d 26 (2d Cir. 1994) (per curiam), a case cited only in passing by petitioners (*see* Pet. 7)—but there it merely upheld a lower-court finding that the neglect was not excusable. In *Hooper*, the defendant had failed to file a timely notice of appeal under Rule 4(b) of the Appellate Rules because his lawyer entrusted the job to a legal assistant who incorrectly thought that she had 30 days (not ten) to file the notice. Those facts are, in many respects, close to those here. But, procedurally, *Hooper* is the mirror image of this case: there, under the comparable provision for criminal appeals, the district court had found that the neglect was *not* excusable, and the Second Circuit simply concluded that this finding was not an abuse of discretion. *See Hooper*, 43 F.3d at 29. That decision cannot fairly be said to conflict with the decision below, where the Ninth Circuit was reviewing the

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[4] In her opinion, Judge Berzon specifically contrasted the "misfiring of a generally well-conceived calendaring system" (Pet. App. 15) with plain disregard of court orders and deadlines (*id.*). Although she was critical of the lawyer's effort in this case, calling it "an exceedingly poor one," *id.*, she recognized that the lawyer did, in fact, make an effort, rather than just letting the deadline pass unnoticed, and that the effort was relevant to the reason-for-the-delay inquiry under *Pioneer*, not just the good faith inquiry. *Id.*

opposite finding (that the neglect *was* excusable) and strongly indicated that it would equally have upheld a finding that it was not. *See* Pet. App. 12.

There is thus no direct conflict between the decision below and the decision of any other federal court of appeals. Nonetheless, we recognize that, at a more general level, there are differing views about whether federal courts should designate certain kinds of neglect as per se inexcusable. As we discuss in the next section, we do not believe that this Court needs to grant certiorari in order to address those views.

II. THERE IS NO NEED TO AMEND THE PIONEER STANDARD

The decision of this Court in *Pioneer* made several critical points about the concept of "excusable neglect." Most broadly, it rejected the notion that "excusable neglect" requires a showing of circumstances beyond the movant's control, holding instead that "the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." 507 U.S. at 395. *See also* note 3 *supra* (identifying *Pioneer* factors). More narrowly, the Court gave explicit direction to the lower courts regarding exercise of that equitable discretion, advising that "inadvertence, ignorance of the rules, or mistakes construing the rules *do not usually constitute 'excusable' neglect.*" 507 U.S. at 392 (emphasis added). That observation established the basic principle that lower courts should typically deny relief for missing deadlines, if the movants show nothing more than such routine hard-to-justify errors. *See, e.g., Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, 469 (5th Cir. 1998) (noting that, under *Pioneer*, misconstruction of rules will "rarely" satisfy standard).

Petitioners acknowledge the importance of the *Pioneer* admonition, quoting it at the outset of their "Reasons for Granting the Petition" section. *See* Pet. 6. Nevertheless, they

urge this Court to go even further and to refine when, and under what circumstances, the failure to comply with a clear federal rule may be considered "excusable neglect." Pet. 10-13. Even though some Circuits have attempted this undertaking, at least in part, *see* pages 12-13 *supra*, we do not think it necessary for this Court to do so. There are several reasons for this view.

To begin with, the "do-not-usually-constitute-excusable-neglect" instruction in *Pioneer* already results in substantial conformity among federal courts with regard to findings of "excusable neglect." All federal courts of appeals, including the Ninth Circuit, acknowledge and accept the prevailing rule that requests for extensions of time based on lawyer misfeasance should "usually" be denied, relying on the language of *Pioneer* for that understanding. *See, e.g.*, Pet. App. 7; *Speiser, Krause & Madole P.C. v. Ortiz*, 271 F.3d 884, 886 (9th Cir. 2001); *Torres*, 372 F.3d at 1163; *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 368 (2d Cir. 2003); *Mirpuri v. ACT Mfg, Inc.*, 212 F.3d 624, 631 (1st Cir. 2000); *Thompson v. E.I. DuPont de Nemours & Co., Inc.*, 76 F.3d 530, 533 (4th Cir. 1996). That common approach leaves only a small minority of cases in which federal courts are apt to find "excusable neglect" in the first place. And it is by no means self-evident that Circuits with facially less flexible standards would actually decide those cases any differently. *See* pages 17-18 *infra*.

It is also not clear that more categorical rules would ultimately produce much more uniformity. As this Court observed in *Pioneer*, "narrowing the range of factors to be considered in making the 'excusable neglect' determination will not eliminate disputes about how the remaining factors should be applied in any given case." 507 U.S. at 395 n.14.[5]

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[5] This Court has noted that some terms are largely incapable of precise definition. *See, e.g., Maryland v. Pringle*, 540 U.S. 31, 42 (2003) ("probable cause"); *United States v. Sokolow*, 490 U.S. 1, 7 (1989) ("reasonable

Thus, for example, a blanket rule barring extensions based upon a "lawyer's misreading of clear law" not only would raise questions about whether it encompasses instances of delegation to a trained assistant, as in this case, but would also invite possible disagreements about whether it should apply to errors of fact as well as law. *See, e.g., Advanced Estimating System*, 130 F.3d at 999 (suggesting such a distinction); *Silivanch*, 333 F.3d at 369 (rejecting such a distinction); Pet. App. 13 (same). And, even apart from considerations like extenuating outside circumstances, there cannot help but be conflicting views about the core question of whether particular laws are truly clear, especially if calculation of a deadline requires review of several interrelated statutory provisions. *See, e.g., Weinstock*, 16 F.3d at 503 (characterizing a former rule as a "trap for the unwary.")

What is probable, then, is that federal courts will apply even categorical rules with an eye towards the particular circumstances of a given case. For example, both the Seventh and Eleventh Circuits, despite seemingly hard and fast rules, *see* pages 12-13 *supra*, have found "excusable neglect" even when lawyers missed a deadline set by an undeniably clear provision. In *United States v. Brown*, the Seventh Circuit, ruling just two years after its decision in *Prizevoits*, affirmed a finding of "excusable neglect" on the ground that the negligent attorney (unlike the *Prizevoits* attorney) was relatively inexperienced in federal court matters. *See* 133 F.3d at 997 ("[b]ecause of his inexperience Brown's attorney admits he did not know the rule.") And, in *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996), the Eleventh Circuit found "excusable neglect" when a lawyer missed an easily-identified deadline because a secretary had failed to

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suspicion"). *See also Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("Constitution does not require that any particular form of words be used" to express concept of reasonable doubt).

advise him that he (rather than another attorney) needed to file the required papers. *See id.* at 849-50. *See also Advanced Estimating System*, 130 F.3d at 998-99 (discussing *Cheney*); *Walter v. Blue Cross & Blue Shield of Wisconsin*, 181 F.3d 1198, 1202 (11th Cir. 1999) (finding "excusable neglect" when secretary forgot to calendar response to motion).

We question, therefore, whether a more rigid set of "excusable neglect" rules would add much of value to the standards set forth in *Pioneer*. This Court has already established that the proper test for determining "excusable neglect" is to be strict, though not absolute. Under that directive, a federal court, "taking account of all relevant circumstances," 507 U.S. at 395, may sometimes (though not usually) find a lawyer's carelessness to be excusable. *See generally Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("[e]quity eschews mechanical rules . . . [and] depends on flexibility.") That is all that happened here. The Ninth Circuit, applying the *Pioneer* standards, expressed disapproval of the lawyer's reliance on his firm's calendaring system but declined to find such reliance to be so out of order that it must be deemed inexcusable as a matter of law.

Finally, we question whether it is necessary to insist upon stricter "excusable neglect" standards when, under the federal rule in question, the neglect is likely to cause little or no prejudice. That is the case under Rule 4(a)(5). While compliance with Rule 4 filing requirements is central to proper appeals, the fact is that Rule 4(a)(5) steers a middle course between flatly prohibiting post-deadline extensions and allowing them for an indefinite period of time, mandating that any motion be filed no more than 30 days after the original deadline and strictly limiting the length of the extension. *See* Rule 4(a)(5)(A)(i) & (C). Those explicit restrictions assure that prejudice to an opposing party will be minimal, and federal courts have frequently pointed out, when applying

the *Pioneer* factors under Rule 4(a)(5), that it will be the rare case in which any genuine prejudice has resulted. *See, e.g., Lowry*, 211 F.3d at 463; *Prizevoits*, 76 F.3d at 134. Indeed, the Second Circuit has held that it is permissible to grant an extension of time under Rule 4(a)(5), even without a strong showing of "excusable neglect," when the opposing party does not raise an objection to the extension. *See Williams v. KFC National Management Co.*, 391 F.3d 411 (2d Cir. 2004); *see also Kontrick v. Ryan*, 540 U.S. 443 (2004). Although the absence of prejudice does not mean that Rule 4(a)(5) extensions ought to be available just for the asking—a practice that *Pioneer* would bar in any event—it does suggest that there is no pressing need to revisit the definition of "excusable neglect" in this context.

The dissent below, while not disputing this general lack of prejudice, *see* Pet. App. 17 ("prejudice is typically minimal"), nonetheless urged a tougher "excusable neglect" standard for a practical reason: it would encourage lawyers to pay greater attention to the rules. Pet. App. 19-20; *see also* Pet. 10-11. Certainly, no one disputes that the lawyer here could have avoided the calendaring mistake by giving greater care to the matter himself, instead of relying so much on the case manager. But that fact can hardly make the error inexcusable in and of itself, since even meritorious claims of "excusable neglect" will involve circumstances in which a lawyer could have, and presumably should have, done more. As this Court pointed out in *Pioneer*, the phrase "excusable neglect," by its very terms, presupposes that there has been neglect (*i.e.* "carelessness"). *See* 507 U.S. at 388. The question, then, inevitably comes back to *why* the lawyer has been careless ("the reason for the delay"), and the facts underlying that inquiry will vary from case to case. While there is never a very good reason for carelessness, it seems at least within the bounds of "excusable neglect" that a lawyer placed too much reliance

on someone who was trained to do the particular task and who had done it without mishap on every previous occasion.[6]

That possibility will not, as the dissent below supposed, encourage more lax behavior by lawyers and their assistants. To state the obvious, few lawyers would ever consciously risk the professional misery that comes from failing to meet a critical filing deadline, with all the attendant costs to the client whose claims may thereby be dismissed. Furthermore, the decision below could give only the coldest comfort to any lawyer wanting to assess whether negligence might be excused. A straightforward reading of that decision makes it quite apparent that district court judges are free to treat the missing of clear deadlines as inexcusable, without being subject to reversal for abusing their discretion. *See* Pet. App. 12. In short, the Ninth Circuit has done little to invite lawyers to be careless about filing dates.

III. THE ISSUES IN THIS CASE MAY SOON BECOME MOOT

The case comes before this Court in an unusual position. After respondents had appealed the adverse decision on the merits—relying on the extension of time granted by the district court—petitioners appealed the order granting that extension. The appeals carried different case numbers in the court of appeals and apparently were not formally consolidated. Nonetheless, pursuant to a court of appeals order, the appeals were argued at the same time before the same panel. Because the panel held that the extension of time was invalid, it had no cause to reach the merits of the case.

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[6] The Ninth Circuit did not suggest that reliance on a co-worker would always be a possible basis for "excusable neglect." For example, it is highly doubtful that a lawyer could rely on delegation when the tasks assigned were plainly beyond the competence of the assistant. In this case, however, no one questions that a trained and experienced calendaring clerk, like the one here, is fully capable of reading Rule 4(a)(1)(A) to set a filing date of 30 days after entry of judgment.

The en banc court then vacated the panel's judgment and affirmed the order granting the extension, effectively reinstating the appeal of the merits. With respect to that appeal, it said: "The merits of the appeal are before the three judge panel in appeal number 02-56491. The panel should proceed to decide that appeal." Pet. App. 14. That is where matters now stand. Having been fully briefed and argued, the merits appeal is under consideration by the original panel.

This sequence of events raises an obvious possibility that a decision below will render moot, or at least make irrelevant, the issue raised in the present petition. If petitioners were to prevail on their arguments that the judgments should stand, and if no further review were sought or obtained, it would seem to make no practical difference whether respondents had filed a timely appeal or not. Although the disposition by the court of appeals might differ in form—between a dismissal and an affirmance—that difference would not appear to have any real effect on the parties themselves. In either case, petitioners would be entitled to their judgments.[7]

The petition thus may be regarded as premature. In our view, however, the previously stated reasons for denial would apply equally to a petition filed after disposition of the merits. We request, therefore, that the petition be denied.

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[7] The jurisdictional issue is not moot, of course, if respondents prevail on the merits. Their ability to do so depends upon the validity of their notice of appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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